Filed 12/15/09 Marriage of Nordstrom CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of REBECCA AND DAVID NORDSTROM.	
REBECCA NORDSTROM, Appellant, v. DAVID NORDSTROM, Respondent.	E046764 (Super.Ct.No. RID196479) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan and Sharon J. Waters,[1] Judges. Affirmed.

Harry J. Histen for Appellant.

David Nordstrom, in pro. per., for Respondent.

[1] All matters were heard before Judge Becky Dugan. Judge Waters signed the judgment in Judge Dugan's absence.

Appellant Rebecca Nordstrom (Rebecca) challenges the trial court's judgment that Respondent David Nordstrom's (David's) accumulated vacation and sick leave had no cash value as of the date of separation and thus were not a community property asset. As discussed below, we affirm the trial court's judgment based on the rule set forth in *In re Marriage of Lorenz* (1983) 146 Cal.App.3d 464 (*Lorenz*), because David could not have exchanged his leave hours for money as of the date of separation.

STATEMENT OF FACTS AND PROCEDURE

In 1999, David became a Riverside County Sheriff's Department Captain. At that time he was subject to the 1999-2005[2] and 2005-2008 Memoranda of Understanding (MoU) between the Riverside County Law Enforcement Management Unit (LEMU) and the County of Riverside. As of the date of separation (July 10, 2002) David had accumulated 567.12 hours of unused vacation and 2,483.40 of unused sick leave. These benefits could not be exchanged for cash while David was still employed. They were to be used solely to restore pay otherwise lost because of absence from work. As of July 1, 2003, the leave was converted to 1200 hours of annual leave. The annual leave could be converted to cash at the rate of 80 hours per year, or 160 hours per year with approval of the employee's agency or department head. This conversion was authorized in the 1999-2005 MoU.

The record does not indicate with certainty when the 1999-2005 MoU was entered into, that is, whether this MoU was effective as of the separation date of July 10, 2002.

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[2] Either the 1999-2005 or 1999-2002 MoU, depending on which party one chooses to believe.

Rebecca did not provide a copy of a dated signature page when she provided this MoU to the trial court on September 27, 2007 with her post-trial brief. The copy of the 2005-2008 LEMU MoU that Rebecca submitted on the same date contains the signature page with a date of August 23, 2005. On November 6, 2007, attached to his declaration in support of motion for reconsideration, David submitted to the trial court a copy of the 1999-2002 LEMU MoU that does *not* provide for the conversion to annual leave or for cashing in of leave time. The copy of this MoU contains a signature page dated February 25, 1999. In the declaration, David states that "[t]he County chose in 2003 to create the [a]nnual leave bank" because from 1999 to 2003, the staffing shortages caused many managers to lose accumulated leave time because they were unable to get approval to take time off. As discussed below, whether the right to cash in annual leave hours, exercisable as of July 1, 2003, was established by MoU as of the July 10, 2002, date of separation is not determinative. This is because we look to whether the cash-in option was actually available to David, and therefore the community, as of the date of separation.

On July 10, 2002, the parties separated after 27 years of marriage. The marriage was terminated on August 19, 2004. Unresolved property issues were tried on July 23 and August 24, 2007. The trial court gave the parties until September 28, 2007, to submit post-trial briefs addressing the community property treatment of David's accrued vacation and sick leave. Becky submitted her brief and copies of the MoUs on September 27, 2007, but David did not submit a brief.

On October 23, 2007, the trial court issued its intended ruling finding that the accrued annual leave (formerly vacation and sick leave) was community property and ordered its division. On November 6, 2007, David filed a motion asking the court to reconsider its decision. David argued there was no community property interest in the annual leave account because on the date of separation: 1) the benefits were not yet "annual leave"; and 2) the vacation and sick leave accounts could not at that time be converted to cash. Becky filed her opposition on November 29, 2007.

On December 12, 2007, the trial court reversed its tentative decision and ruled that, as of the date of separation, the annual leave had no cash value and thus no value as community property.[3] Judgment was entered on June 20, 2008.

On July 1, 2008, Rebecca filed a notice to set aside the judgment and enter a new and different judgment pursuant to section 663. On July 28, 2008, David filed his response. On August 12, 2008, the trial court heard the section 663 motion and denied it. This appeal followed.

DISCUSSION

Rebecca argues that the 1200 hours of annual leave earned before separation is community property because it is a vested deferred compensation property right. David

[3] "The court finds that as Petitioner could not cash out or receive any compensation for said vacation and sick leave and/or annual leave as of the date of separation, there is no community value to the vacation bank nor the sick leave bank as of the date of separation. So Petitioner shall take nothing for her claim to compensation for annual leave."

counters that the annual leave is not community property because it had no cash value on the date of separation.

In determining whether the 1200 hours of annual leave is community property, we follow the rule set forth in the single case most squarely on point, *Lorenz*, *supra*, 146 Cal.App.3d 464. In *Lorenz*, the husband testified that he had accumulated 120 hours of vacation time, but that he would not be paid for it if he did not use it. (*Id.* at p. 467.) The appellate court concluded that the vacation benefits and a term life insurance policy were not community assets because, on the date of separation, neither was "convertible to cash." (*Id.* at pp. 467-468.) The appellate court reasoned that "the mere fact that these assets are of benefit to husband does not compel the conclusion that that benefit must, or can, be divided." (*Id*. at p. 467.) The court listed the following employment benefits that are of benefit to the employee but are not divisible on dissolution of a marriage because they cannot be exchanged for cash: exercise facilities, reduced prices on meals at an employee cafeteria, discounts on purchases at employer-owned retail stores, and flexible scheduling. (*Id.* at pp. 467-468.) The *Lorenz* court also pointed to other intangible assets that are considered to be community property assets, such as various types of retirement and pension benefits. The key to characterizing each of these benefits as community property was that each was "acknowledged to have economical monetary value." (*Id.* at p. 467.) Here, as the trial court ruled, David's leave benefits had no economical monetary value on the date of separation because they could not be exchanged for cash. One could argue that it was possible to assign a reasonable estimated value to those benefits at that time, namely David's hourly wage. However, as the *Lorenz* court also

discussed "'[I]t is implicit in the scheme of community property laws that property have certain attributes - - that it be susceptible of ownership in common, of transfer, and of survival.' [Citation.]" (*Id*. at p. 462.) On the date of separation, David could not transfer his leave time for anything of monetary value. Thus, under the rule set forth in *Lorenz*, the leave time was not a community property asset.

The cases citing *Lorenz* are concerned with whether term life insurance is a community asset. The only published California case to consider, though in dicta, the validity of *Lorenz* as it applies to vacation benefits is *In re Marriage of Gonzalez* (1985)168 Cal.App.3d 1021 (*Gonzalez*). In *Gonzalez*, the trial court found that two term insurance policies on the husband's life had no cash value and awarded one to each spouse. The appellate court reversed and remanded, holding that the two policies should have been awarded only after determining their relative values. This is because, although each of the policies lacked a cash surrender value, they still had economic value that could be quantified.

The *Gonzalez* court disagreed with *Lorenz*. "*Lorenz* is simply incorrect in the assertion that assets such as term life insurance and accrued vacation time have no economic value, particularly if the test is the amenability of the asset to valuation." (*Gonzalez, supra*, 168 Cal. App. 3d. at p. 1024.) The court cited to a case upon which Rebecca also relies, *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, for the proposition that vacation time "constitutes deferred wages for services rendered" and thus

can have a cash exchange value. *Suastez* held that, under Labor Code section 227.3[4], a company must pay a terminated employee for vacation time that was earned throughout the year, even when the employee was not eligible to use the vacation time until the employee's anniversary date and could not receive pay in lieu of using the vacation time. The reasoning in *Suastez*, while certainly applicable to determining whether Labor Code section 227.3 requires an employer to pay a terminated employee for earned but unused vacation benefits, is simply not relevant to determining whether vacation and sick leave benefits that cannot be exchanged for cash are community property assets.

Our main disagreement with *Gonzalez* is that the test set forth in *Lorenz* is not whether an asset is amenable to approximate valuation. Even most intangible assets can be assigned an estimated hypothetical value. Rather, the test set forth in *Lorenz is* whether, as of the date of separation, an asset can actually be traded in for cash. The parties do not dispute that, as of the date of separation, David could not in reality have traded in his 567.12 hours of vacation or 2483.04 hours of sick leave for money. Therefore, under the rule set forth in *Lorenz*, although one could reasonably assign a theoretical monetary value to the leave time, it was not a community asset because it could not actually be exchanged for cash.

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[4] "[W]henever a contract or employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate . . . ." (Labor Code, § 227.3.)

DISPOSITION

The judgment of the trial court is affirmed. Parties to bear their own costs.

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RAMIREZ
P.J.

We concur:

McKINSTER
J.

KING
J.